No. 2972

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY,
a corporation, and
PERCY G. ALLEN,
Appellants,

vs.

BROWN-MEYER COMPANY,
a corporation,
Appellee.

Appeal from the District Court of the United States for the District of Oregon.

APPELLEE'S BRIEF.

JOSEPH L. ATKINS,
of Counsel for Appellee.

T. J. GEISLER,
of Counsel for Appellants.

BOYER PRINTING CO. PORTLAND

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APPELLEE'S BRIEF.

INFORMALITY OF APPELLANTS' BRIEF.

In this case it appears that the Assignment of Errors on behalf of the Appellants fails to comply with the requirements of Rule 11 of this Court, and motion to dismiss upon that ground will be presented under provisions of Rule 21.

It also appears that no Brief, conformable to the requirements of Rule 24 of this Court, has been filed, and motion to dismiss upon that ground will also be presented.

It further appearing that certain matters not in evidence here have been included in the Transcript, and also that certain copies of patents not embraced within the certified Transcript, have been served upon counsel for Appellee, presumably with the purpose of attempting to present them before this Court in argument in this appeal, motion will be presented to strike from the record, and to disregard such matters, or so many of them as this Honorable Court may deem proper to exclude.

In view of the failure of the Appellants to present in their brief (a) a concise abstract or statement of the case, or (b) a specification of the errors relied upon, or (c) a brief of the argument in proper form, all as prescribed by Rule 24 aforesaid, it appears that Appellee's brief should, in accordance with Sec. 3 of the Rule, present, at the outset, a statement of the case, in which view the following is submitted.

STATEMENT OF THE CASE.

This is an appeal after decision and interlocutory and supplemental decrees in favor of plaintiff from the order of the court below denying motion to vacate the supplemental decree in a suit brought in the United States District Court, for the District of Oregon, by Brown-Meyer Company, hereinafter, in respect to its relationship fixed in the trial court, designated Plaintiff, against Crystal Laundry Company, a corporation, and Percy G. Allen, in like manner

designated Defendants, for the infringement of U. S. Letters patent, No. 1,115,895, granted to Brown - Meyer Company, as assignee of Charles F. Brown, under date of November 3, 1914, upon application filed by said Brown on August 13, 1913, for Improvements in Towel Holders. The device in suit, as indicated in the patent, is "one for holding and preserving in order an assemblage of clean towels that are carried in such a manner as to keep them clean, folded and smooth as they come from the laundry, until such time as they are required, one by one, for use." Provision is also made for conveniently withdrawing the towels, one by one from the pile, for facilitating the manipulation of each while in use, and for securing them against accidental misplacement or intentional and unauthorized removal after use.

ANSWER ADMITS VALIDITY OF THE PATENT.

To the Bill of Complaint, Defendants made Answer in usual form, admitting the validity of the patent.

PRIOR STATE OF THE ART.

Answer sets up the prior state of the art to be that shown in letters patent of the United States, as follows:

N. S. Baldwin and E. S. Goodwin, Number 557,754, date Apr. 7, 1896.

J. G. Cooner, Number 908,076, date Dec. 29, 1908.

J. Rousso, Number 42,398, Des., date Apr. 9, 1912.

L. Straub, Number 1,038,984, date Sept. 17, 1912.

T. K. Taylor, Number 1,052,292, date Feb. 4, 1913.

G. Reid, Number 1,067,622, date July 15, 1913.

T. Heins and E. R. Galland, Number 1,078,501, date Nov. 11, 1913.

At the trial, Defendants introduced in evidence copy of the File Wrapper and Contents of the patent in suit (Transcript pp. 104-120) and copies (not placed in printed Transcript (See Transcript p. 100) of the patents set up in the Answer, all of which were considered by the Patent Office in the examination of the application.

At the trial, also, particular stress was laid on the Reid patent, No. 1,067,622, Defendants' Exhibit 7. (Not paged in Transcript). The differences between the Reid device and that in suit are radical and obvious to one skilled in the art and acquainted with both. The Patent Office considered, along with others set up in the Answer, this patent in particular, and decided that the Reid patent, as well as the others, was not an anticipation of the patent in suit. To the allowance of the patent in suit over the Reid patent, attention of Counsel for Defendants was pointedly directed by the Court at the trial, and in response to the Court's reference thereto Defendants' Counsel says "and in that (action) the Patent Office, we will say, was correct" (See Transcript pp. 74-75).

INFRINGEMENT ADMITTED.

Said Answer furthermore admits (Transcript p. 11) Defendants' infringement of said patent from the date thereof to about November 30, 1914.

The fact of such infringement is also expressly admitted by counsel for Defendants in answer to question put by the Court (Transcript p. 67).

CHANGE ALLEGED TO AVOID INFRINGEMENT.

At the time last named Counsel alleges on behalf of Defendants that they made a change in their device by which he claims they avoid infringement. The language employed by Defendants' Counsel in referring to the alleged change is significant in that it admits continued use of the same device. In reply to the question put by the Court, "You are not using it, or have you changed it?" Defendants' Counsel replies: "We have changed it, your Honor." (Transcript p. 67).

In respect to the alleged change aforesaid in Defendants' device, admitted before such alleged change to have been an infringement of the patent in suit (Transcript p. 11), and to have been made about Dec. 1, 1914, W. C. H. Smith, Defendants' witness, who says (Transcript p. 80) he is one of the "partners" of the Broadway Towel Supply Company as he was in July, 1914, testifies, that when Defendants were required, by ordinance passed by the Council of the City of Portland, July 29, 1914, No. 29270 (set forth in Transcript p. 85) to use a sanitary device, "The one I installed was the one

they (Plaintiff) had been using before I put ours in." (Transcript p. 84).

CHANGE ALLEGED IS MERE CHANGE OF USE. INFRINGING DEVICE UNCHANGED.

The change referred to, made about Dec. 1, 1914 (Transcript pp. 71 and 83) was no change in the device at all. It consisted, according to Defendants' witness, merely in temporarily disengaging the end of the chain from the lock and putting that to the end of the basket. (See next to last paragraph, p. 83, Transcript). The structure continued to be identical with that admitted in the Answer to be an infringement. Defendants persisted in using the same device until restrained by injunction.

COURT HOLDS INFRINGING DEVICE UNCHANGED.

His Honor, Judge Wolverton, decides (Transcript p. 15): "The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff's contrivance," and that "defendants are infringing." In reference to alleged change in Defendants' device (Transcript p. 17) the Court says: "I am impressed that the alleged new device

is merely colorable and without potent variation such as will avoid infringement."

INTERLOCUTORY DECREE.

Upon the decision aforesaid "Decree for injunction and accounting" (Transcript pp. 17-20) was entered January 31, 1916.

CONTEMPT PROCEEDINGS.

While an accounting before John B. Cleland, Esq., a Special Master (See Transcript p. 20) was in progress, Plaintiff brought a "Motion to punish Defendants for Contempt" (Transcript pp. 20-24).

Defendants answering said Motion admit inadvertent use of a single towel rack. (Transcript pp. 24-27).

SUPPLEMENTAL DECREE UPON CONTEMPT PROCEEDINGS.

The cause having been heard in open court on contempt proceedings, His Honor Judge Wolverton, on March 21, 1916, made a Supplemental Decree, holding use of device before the Court (shown in cut inserted between pp. 38 and 39 of Transcript) in addition to that of one identical device covered by the original decree to constitute a continuing infringement (Transcript p. 29) and violation of the injunction, but condones the offense upon showing made.

MOTION TO VACATE SUPPLEMENTAL DECREE.

Motion to vacate decree of March 21, 1916, was made under date of April 4, 1916 (Transcript pp. 31-32).

MOTION FOR NEW TRIAL.

Aforesaid motion to vacate decree was accompanied by another "Motion for leave to file Supplemental Answer" (Transcript pp. 46-47); by a "Petition for leave to file Supplemental Answer and take proofs thereon" (Transcript pp. 47-52); and by a "Proposed Supplemental Answer" (Transcript pp. 53-56), said "Petition" and "Proposed Supplemental Answer" being based upon alleged newly discovered evidence, to-wit: an alleged patent of the United States, alleged to have been granted Oct. 19, 1915 (over three months before Decree in suit was entered. (Transcript, p. 17) to one J. Rousso, and, also, an alleged pending application for U. S. Patent on behalf of one Henry A. Ammann, set up in previously denied "Motion to vacate Supplemental Decree of March 21, 1916." (*Vide, Supra*).

The foregoing motion, etc., appear to have no place on appeal, and are included in Appellee's motion to strike.

COURT DENIES MOTION.

Order Denying Motion to vacate Supplemental Decree of March 21, 1916, and fixing appeal bond on No-

tice of Appeal in open Court, is dated April 17, 1916. (Transcript pp. 57-58).

COURT DENIES PETITION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER.

Order dated April 17, 1916. (Transcript, pp. 58-59).

PETITION ON APPEAL AND ORDER OF ALLOWANCE.

Petition on appeal is directed against entering Supplemental Decree of March 21, 1916, and order of April 17, 1916, denying Motion to vacate same. (Transcript p. 62). Order allowing petition dated April 20, 1916. (Transcript p. 63).

ASSIGNMENTS OF ERROR. ARGUMENT.

In anticipation of the possibility that this Honorable Court may determine, upon hearing of motion, that Appellants are entitled to be heard upon some one or more of their Assignments of Error presented, attempt is hereinafter made to arrive at an understanding of the apparent or possible meaning of said Assignment of Error and to make herein reply thereto.

Before proceeding, however, to consider the Assignments of Error, *seriatim,* it is submitted that the peti-

tion on appeal (Transcript p. 62), lays but one ground for appeal, namely, the refusal of the Court below to vacate Supplemental Decree entered March 21, 1916.

Upon this point it would appear there can be no controversy, in view of the decision of the Supreme Court.

> Discretionary rulings not subject to review. Vacating judgment discretionary and not subject for review.
>
> Sun Cheong-Kee vs. United States, 70 U. S. (3 Wall.) 320.

The following is a review of the Assignments of Error, one by one:

I.

"The District Court erred in finding the towel rack (designated on this appeal Exhibit A) adopted by defendants after the interlocutory decree herein entered January 31, 1916, to be covered by the patent in suit, and extending and continuing the injunction of said decree to said towel rack by the entry of said supplemental decree on March 21, 1916." (Transcript pp. 59-60).

> The Court will hardly consider this assignment, since it is in glaring violation of the requirements of Rule 11 of this Court. It not only couples two distinct allegations of error, but it lacks particularity in many instances. For conspicuous example, it refers (line 2) to alleged "appeal Exhibit A." No such exhibit is found in the record,

much less designated as the Rules require. The index makes no reference to any exhibits except in list p. 103 of Transcript, wherein the patent in suit appears as "Plaintiff's Exhibit A." There are two different paper exhibits in the Transcript, both marked simply "Exhibit A." Neither is marked "Appeal Exhibit A." Here is confusion thrice confounded, and inextricable.

II.

"The District Court erred in entering the order of April 17, 1916, denying the motion of defendants to dissolve and vacate said supplemental decree, and in refusing to take all the proofs of the parties either before itself, or the Master regarding the premises." (Transcript p. 60.)

Assignment II is indefinite and couples two distinct allegations of error, to-wit, denial of Defendants' motion to vacate supplemental decree *and* refusing to take certain proofs. Neither alleged error involves the other.

It is, moreover, an appeal from a motion to vacate which is not reviewable. *Vide Supra,* 70 U. S. 320.

III.

"The District Court erred in entering said supplemental decree in the course of summary contempt proceedings, notwithstanding the Court had previously and

in conformity with said interlocutory decree appointed a Master for ascertaining and reporting the use by defendants of the invention covered by the patent in suit, and the proceedings before such Master were pending at the time; and that in consequence defendants were taken by surprise, had no opportunity of presenting their defense, and were deprived of their substantial rights in the premises." (Transcript p. 60).

This assignment, involved and indefinite, appears to negative the power of a District Court of the United States to control its own procedure in contempt proceedings. In the absence of any authority to support or indeed any reference to the assignment, such a proposition would appear to be a palpable *reductio ad absurdum.*

IV.

"That the proceedings of the District Court with respect to said towel rack were erroneous, and not in accordance with the usual and better practice of courts of equity in the premises, for it compelled the defendants to defend their rights in the premises piecemeal, and in so doing imposed upon defendants unnecessary and avoidable expense." (Transcript p. 60).

This assignment is impossible to deal with in its indefiniteness and wholesale condemnation (without specification of any particular error) of the "proceedings of the District Court" (line 1).

V.

That the District Court erred in refusing to permit defendants to prove the undenied facts alleged in the papers on which defendants moved to dissolve and vacate said supplemental decree, and which facts showed that said towel rack anticipated the invention purported to be covered by the patent in suit; and the District Court's said acts deprived the defendants of their substantial rights in the premises. (Transcript, p. 61.)

Merely a re-statement in other words of Assignment II and bad for like reasons.

VI.

"The District Court erred in not finding that, on the undenied facts shown by the papers on which defants' motion to dissolve said supplemental decree was based, if said towel rack infringes the invention covered by the patent in suit, then, by reason of antedating said alleged invention, said patent is void." (Transcript, p. 61.)

Giving this assignment the benefit of every doubt which its obscure phraseology and its lack of particularity under the rule raises, it appears to be open to at least three fatal objections.

If it means (what it does not say) that the court below erred in refusing to consider a Patent (Rousso) alleged to have issued Oct. 19, 1915, appellants are bound by their want of proper diligence which would have enabled

them to discover its existence, if the fact was as elleged, before the trial.

Brill vs. North Jersey St. Ry. Co., 125 Fed. 526.

Panzl vs. Battle Island Paper and Pulp Co., 132 Fed. 607.

If it means that the court below erred in refusing to consider an alleged application for patent only pending, there is no discoverable ground to support the allegation of error. Even in respect to the alleged Rousso patent that is, by reason of the lateness of its alleged date, no bar to the patent in suit.

The date of issue, not the filing date, determines whether or not one patent anticipates another.

Alvord *et al.* vs. Smith and Watson Iron Works *et al.,* 216 Fed. 150, 154 (Dist. Court Oregon) 1914.

If said assignment is an attempt on the part of appellants to set up the defense that the patent in suit is void, they are estopped by their Answer as well as by admission of their counsel in open court. (Transcript, p. 75.)

VII.

"That the entire proceedings of the District Court in the premises were erroneous and were to the prej-

udice of the substantial rights of the defendants, and resulted in an improvident use of the powers of said court." (Transcript, p. 61.)

Assignment of error in such general terms is believed to be condemned by every authority and precedent without exception.

One case, for example, should suffice:

P. P. Mast & Co. vs. Superior Drill Co., 154 Fed. 45.

See ruling therein on second, third, fourth and fifth Assignment of Error by Appellant, second paragraph, page 50.

In view of the foregoing it is respectfully submitted to the determination of this Honorable Court that the action of the Court below set forth in Petition on Appeal (Transcript, p. 62) is not reviewable; that the assignments of error are bad in form; and that no error unassigned appears of record.

Respectfully submitted,

JOSEPH L. ATKINS,

of Counsel for Appellee.